

Berry Amendment FAQ

CAUTION: THESE FAQs ARE FOR GENERAL INFORMATION AND ARE NOT DEFINITIVE. THE STATUTE AND REGULATIONS SHOULD ALWAYS BE REVIEWED FOR THE DEFINITIVE RULES THAT APPLY TO INDIVIDUAL FACT SITUATIONS.

These Frequently Asked Questions address only the Berry Amendment (10 U.S.C. 2533a), covering textiles, food and hand or measuring tools. Specialty metals are no longer part of this law. Specialty metals are restricted under Section 842 of the FY2007 NDAA and separate FAQs are being prepared to address this restriction.

General Questions:

1. What is the Berry Amendment?

The Berry Amendment was originally passed by Congress in 1941 to promote the purchase of certain U.S. goods. The Amendment was included in subsequent defense appropriations act until it was made permanent in Fiscal Year 1994 by section 8005 of Public Law 103-139. It was subsequently codified as [10 U.S.C. 2533a](#) in 2002 by section 832 of Public Law 107-107. On October 17, 2006, the President signed the National Defense Authorization Act for Fiscal Year 2007. Under section 842 of this Act, the restrictions relating to specialty metals were deleted from 10 U.S.C. 2533a and placed in 10 U.S.C. 2533b. These FAQs have been revised by deleting specialty metals from this discussion of the Berry Amendment. As of November 16, 2006, the law restricts any funding appropriated or otherwise available to DoD from being used to buy the following end items, components, or materials unless they are wholly of US origin: An article or item of food; clothing; tents, tarpaulins, or covers; cotton and other natural fiber products; woven silk or woven silk blends; spun silk yarn for cartridge cloth; synthetic fabric or coated synthetic fabric (including all textile fibers and yarns that are for use in such fabrics); canvas products, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles); or any item of individual equipment (Federal Supply Class 8465) manufactured from or containing such fibers, yarns, fabrics, or materials; and hand or measuring tools.

2. Where can I find Berry Amendment regulations?

The Berry Amendment is implemented through the Defense Federal Acquisition Regulation Supplement (DFARS) at [Subpart 225.7002](#). The contract clauses that apply to the acquisition of the items listed in A.1., above, are DFARS [252.225-7012](#) and DFARS [252.225-7015](#). You can also find policy on the Berry Amendment in Procedures, Guidance and Information (PGI) 225-70.

3. What if I am from a DoD buying activity but I am spending non-DoD money, for example, on behalf of an FMS country or another U.S. Federal agency-- is the Berry Amendment applicable in that circumstance?

Yes. FMS funding and other Federal agencies' funding is being made available to DoD and therefore falls under the Berry Amendment. The Berry Amendment also applies when DoD provides funding to another agency to buy items. The other Federal agency must incorporate and enforce the Berry Amendment in contracts awarded on behalf of DoD. Violation of the Berry Amendment would generally also result in the violation of the Anti-Deficiency Act ([31 U.S.C. 1341](#)).

4. Does the Berry Amendment allow for any exceptions?

Yes, there are a number of exceptions provided by the law. When using any of the exceptions, the contracting officer must ensure that the appropriate determination or documentation is in the contract file and the normally required DFARS clauses are omitted from the solicitation and contract. The exceptions established in [DFARS 225.7002-2](#), are summarized below.

1. The Berry Amendment does not apply if the Government prime contract is below the [Simplified Acquisition Threshold \(SAT\)](#). If the prime contract is over the SAT, the prime contractor must comply with the restrictions of the Berry Amendment.
2. A waiver (Domestic Non-Availability Determination (DNAD)) to the Berry Amendment may be granted if the Secretary concerned determines that items grown, reprocessed, reused, or produced in the United States cannot be acquired as and when needed in a satisfactory quality and sufficient quantity at U.S. market prices (does not apply to acquisitions of hand or measuring tools).
 - Documentation required for a waiver:
 - An analysis of alternatives that would not require a domestic non-availability determination; and
 - A written certification by the requiring activity, with specificity, why such alternatives are unacceptable
 - Who can make Domestic Non-Availability Determinations?
 - The Under Secretary of Defense (Acquisition, Technology and Logistics).
 - The Secretary of the Army.
 - The Secretary of the Navy.
 - The Secretary of the Air Force.
3. In FAR 25.104, there are a number of items that the US Government has determined may not be available in sufficient quality or quantity in the US. However, the Berry Amendment may still apply to procurements of these items.

Items listed in [FAR 25.104](#) are items for which domestic sources can only meet 50 percent or less of total U.S. Government and non-government demand. To be considered unavailable under the Berry Amendment, the item must not be available from any domestic source. Therefore, the procuring agency must conduct market research to determine if the item is available from any domestic source. For a complete listing of these items see: [FAR 25.104 Nonavailable articles](#);

4. The Berry Amendment does not apply to acquisitions outside the United States in support of combat operations.
5. The Berry Amendment does not apply to acquisitions of food or hand or measuring tools-
 - In support of contingency operations; or
 - For which the use of other than competitive procedures has been approved on the basis of unusual and compelling urgency in accordance with [FAR 6.302-2](#)
6. The Berry Amendment does not apply to acquisitions of perishable foods by, or for, activities located outside the United States for personnel of those activities.
7. The Berry Amendment does not apply to emergency acquisitions by, or for, activities located outside the United States for personnel of those activities.
8. The Berry Amendment does not apply to acquisitions by vessels in foreign waters.
9. The Berry Amendment does not apply to acquisitions of items specifically for commissary resale.
10. The Berry Amendment does not apply to acquisitions of end products incidentally incorporating cotton, other natural fibers, or wool, for which the estimated value of the cotton, other natural fibers, or wool-
 - Is not more than 10 percent of the total price of the end product; and
 - Does not exceed the simplified acquisition threshold
11. The Berry Amendment does not apply to acquisitions of foods (other than fish, shellfish, or seafood) that have been manufactured or processed in the United States, regardless of where the foods (and any component if applicable) were grown or produced.
12. The Berry Amendment does not apply to acquisitions of waste and byproducts of cotton or wool fiber for use in the production of propellants and explosives.
13. The Berry Amendment does not apply to acquisitions of fibers and yarns that are for use in synthetic fabric or coated synthetic fabric (but not the purchase of the synthetic or coated synthetic fabric itself), if
 - The fabric is to be used as a component of an end product that is not a textile product. Examples of textile products, made in whole or in part of fabric, include
 - Draperies, floor coverings, furnishings, and bedding (Federal Supply Group 72, Household and Commercial Furnishings and Appliances);
 - Items made in whole or in part of fabric in Federal Supply Group 83, Textile/leather/furs/apparel/findings/tents/flags, or Federal Supply Group 84, Clothing, Individual Equipment and Insignia;
 - Upholstered seats (whether for household, office, or other use); and
 - Parachutes (Federal Supply Class 1670); or
 - The fibers and yarns are para-aramid fibers and yarns manufactured in a qualifying country (see [DFARS 225.003](#))

- On August 15, 2008, the Under Secretary of Defense for Acquisition, Technology & Logistics made a determination that the Department of Defense can procure articles containing para-aramid fibers and yarns manufactured in a qualifying country as defined in [DFARS 225.003](#).
14. The Berry Amendment does not apply to acquisitions of chemical warfare protective clothing when the acquisition furthers an agreement with a qualifying country (see [225.872](#)).
 5. How does the Berry Amendment differ from the Buy-American Act?

The Buy American Act (BAA) (41 [U.S.C 10a](#)) and Berry Amendment ([10 U.S.C. 2533a](#)) are two separate laws implemented by two different regulations. They differ with regard to their scope, threshold, exceptions, and waiver authority.

The Berry Amendment is applicable to purchases over the simplified acquisition threshold using funds appropriated or otherwise made available to DoD, and applies even if another agency, such as the GSA, is purchasing the item for DoD. Unless an exception under the Berry Amendment is found to apply, it requires that all covered items must be grown, reprocessed, reused, or produced in the United States, regardless of whether they are purchased as end items, components, or materials. With few exceptions, the BAA applies to all supply purchases of supplies or construction materials over the micropurchase threshold for use in the U.S. It also requires the use of domestic construction material. The BAA requires application of a differential factor to the evaluated cost or price of supplies or construction materials that are not domestic end products. A two part test is used to define a domestic end product: (1) the end product must be manufactured in the U.S. and (2) the cost of all its domestically manufactured components must exceed 50% of the cost of all its components. The BAA is applicable to the entire Federal Government. The BAA does not preclude foreign firms from competing for Federal contracts for supplies or construction materials. However the Act does require that an evaluation factor be placed on proposals offering foreign end items. For civilian agencies, this evaluation factor for supply contracts is 6% if the lowest domestic offeror is from a large business, or 12% if the lowest domestic offeror is from a small business. For the Department of Defense (DoD), the evaluation factor is 50%. The evaluation factor for construction material contracts is 6% for all agencies. For more information on the implementation of the BAA, see [FAR 25.1](#) for supplies and [FAR 25.2](#) for construction material.

In procurements that are subject to the WTO Government Purchase Agreement and other Free Trade Agreements, the BAA is waived for designated countries and for Free Trade Agreement countries, see [FAR 25.003](#). Applicability of the BAA is determined by the thresholds specified in the agreements. The thresholds for the various agreements for supplies, services or construction materials are in Federal Acquisition Regulation (FAR) [25.402](#)

For DoD, additional implementation guidance is in the Defense Federal Acquisition Regulation Supplement (DFARS) at subparts [225.1](#) and [225.2](#). The contract provisions

and clauses that apply to acquisition of supplies are [252.225-7000](#) , [252.225-7001](#), [252.225-7020](#) and [252.225-7021](#), [252.225-7035](#) and [252.225-7036](#). For construction, use the DFARS provision and clause at [252.225-7044](#) and [252.225-7045](#). See [DFARS 225.11](#) for a list of all clauses relating to the BAA.

For a more in depth analysis of the Buy American Act, go the Defense Acquisition University 's continuous learning module regarding the BAA [CLC027](#).

6. Who is responsible for determining the applicability of the Berry Amendment to specific procurement actions?

The application of the Berry Amendment is determined for any procurement on a case-by-case basis by the contracting officer.

7. Are Domestic Non-Availability Determinations (DNADs) to the Berry Amendment commonly granted?

DNADs under the Berry Amendment are made only if the USD(AT&L) or a Secretary of a Military Department concerned determines that items grown, reprocessed, reused, or produced in the United States cannot be acquired as and when needed in a satisfactory quality and sufficient quantity at U.S. market prices. An analysis of alternatives must be completed as part of this review, and a determination must be made that none of the possible alternatives can meet the DoD requirements.

Government Contracting Officer's Concerns:

- Food Products:
 - You must purchase foods that are either manufactured or processed in the United States. Qualifying countries are not eligible to supply food products, unless the food will eventually be processed in the U.S. The US manufacturer/processor you contract with can purchase the food, or components of the food, used in the manufacturing process from any country, regardless of where the food (or components of the food) were grown or produced. However, the same rule does not apply to fish, shellfish or seafood. Seafood products must be taken from the sea by a US-flag vessel, or from fishing within the US. All processing or manufacturing of fish, shellfish or seafood must be performed in the U.S., or on a U.S.-flag vessel. Non-seafood food items that are used in the manufacture of fish products (e.g., bread crumbs and spices) are not subject to the restrictions that apply to fish, shellfish or seafood and these can originate outside the United States.
- Textiles and related restrictions:
 - The Berry Amendment has very few exceptions for textiles and related restrictions. For the most part, if you are purchasing textiles clothing, fabrics, fibers and yarns, tents, tarpaulins, or covers, or items of individual equipment (FSC 8465) manufactured from or containing covered fibers,

yarns, fabrics, or materials, all processing/manufacturing must be done in the US and all of the material must be domestically sourced.

- A notable exception is when you are purchasing an item that incidentally incorporates cotton, other natural fibers, or wool. If the value of the cotton, other natural fibers, or wool does not exceed 10% of the total purchase price of the end product AND if the value of the cotton, other natural fibers, or wool is less than the Simplified Acquisition Threshold, these fibers do not have to be of U.S. origin. For example: suppose you are purchasing \$200,000 worth of small electrical appliances. These appliances have cords containing small amounts of cotton or wool, consisting of less than 1% of the total contract price. There are no other textile fibers or fabrics in this product. For this example, the total value of the cotton or wool on your contract is \$1000. Since the amount of the cotton, natural fiber, or wool is less than 10% of the contract's total value AND well under the simplified acquisition threshold, the fibers are not required to be of US origin.
- There are also some exceptions for fiber and yarn used in synthetic fabric (see exception #13, Question #4 above).
- For purchases of clothing within the United States and its outlying areas that exceed the simplified acquisition threshold, there are no exceptions to the Berry Amendment other than non-availability or buying for resale. Otherwise, apparel items and all such raw materials, including all components that are normally associated with clothing (e.g., buttons, zippers), must be grown, reprocessed, reused or produced in the United States. However, the restriction does not cover components such as sensors, electronics, or other items added clothing, that are not normal components of clothing.

I am about to perform market research to determine whether or not a textile component is available (grown, reprocessed, reused, or produced) in the United States. What should I do as part of my market research to determine this?

As part of your market research, you should publicly advertise a "sources sought notification" in ([FedBizOpps](#)) to determine if the product or good you are procuring is available domestically in sufficient quality and quantity. See FAR Part 5 for Synopsizing Contracting Actions. You should also consult the U.S. trade associations representing that product regarding the availability of U.S. sources.

I have concluded my market research and am certain that one or more components of the textile product I want to procure are not available in the United States. What should I do next?

Talk to the customer to determine if there are any other alternative products available domestically that would meet the requirement.

If no alternative products are determined to be acceptable, and you have evidence that the product or component of the product you are procuring is not available domestically you may begin the process of requesting a domestic non-availability determination (DNAD),

pursuant to [DFARS 225.7002-2\(b\)](#). Simultaneously, you should proceed with advertising your solicitation. If you are uncertain whether or not the product or its components are available domestically, you should wait until you receive all the proposals for the procurement in the event that a domestic source is available that you may not have known about. You can proceed with requesting a DNAD only when you are certain that no domestic sources are available.

What is the process for requesting a DNAD?

In accordance with [DFARS 225.7002-2\(b\)](#), the secretaries of the military departments, without power of redelegation have authority to approve DNAD Determination and Findings for their respective requirements. The Under Secretary of Defense for Acquisition, Technology & Logistics serves as the approval authority for the other defense agencies. Each military department has its own procedures for this action and you should contact your Service policy office for guidance.

Procedures, Guidance, and Information (PGI) 225.7002-2(b) establishes the process that should be used for requesting a Determination of Non-Availability from the Under Secretary of Defense (Acquisition, Technology, and Logistics). That procedure is at this link: [Domestic Non-Availability Determination](#)

Your request for determination shall include:

- Documentation of your market research and results
- An analysis of alternatives that would not require a domestic nonavailability determination; and
- A written certification by the requiring activity, with specificity, why such alternatives are unacceptable
- A corrective action plan for obtaining compliant items and your schedule for attaining same

Once the Director of DPAP reviews the request it will be forwarded to the Under Secretary of Defense (Acquisition, Technology, and Logistics) as appropriate for concurrence signature.

I am procuring an item under a Foreign Military Sale (FMS). Since the funds to be used for this purchase were not appropriated to the Department of Defense, does the Berry Amendment apply?

Yes. The Berry Amendment applies to all funds "made available" to the Defense Department. Also, appropriated funds are obligated for FMS procurements although expenditures are usually funds provided by the customer country. Therefore, FMS procurements must comply with the Berry Amendment restrictions.

I have reason to believe that one of my Contractors may be in violation of the Berry Amendment, what should I do?

- Notify your legal counsel immediately. Depending on whether this is occurring pre-award or post-award can effect the options available to DoD.
- Verify that the item is subject to Berry restriction - ask contractor to confirm place of origin . You are not authorized to accept non-compliant Berry supplies.
- Suspend Government acceptance of non- compliant items IAW [FAR 46.407](#).
- Ensure DFAS suspends payment on non- compliant supplies pending resolution.
- Require the contractor to replace the non-compliant parts with Berry compliant ones.
- If no domestic item can be found, the contractor will have to determine if a substitute domestic item is available.
- Present customer with substitute item(s) options for acceptability.
- If justified, prepare waiver request for signature prior to acceptance.

Contractors and Industry:

I represent a US company and am interested in submitting a proposal in response to a DoD solicitation that includes [DFARS 252.225-7012](#) "Preference for Certain Domestic Commodities". I manufacture a textile item that is composed almost entirely of domestically sourced goods; however there is a small amount of fabric that is grown or produced in a foreign country. This material represents a very small amount of the end product. Is my product considered compliant with the Berry Amendment?

Under most circumstances, your item probably does not meet the requirements of the Berry Amendment. End items, components and materials must be wholly grown, reprocessed, reused, or produced in the United States . In order to be eligible for a DoD procurement you must find a domestic source for all fabric or materials used to produce a textile item.

I have searched extensively for a domestic supplier of a particular synthetic textile material. I was unable to find anyone and have determined there may be no domestic source for this material. Who should I contact?

You should contact the Government contracting officer responsible for this procurement. He/she may know whether there are domestic suppliers for this material based on their market research. He/she may be aware of an already existing determination of non-availability for this fiber or material, however such determinations are rare. If they agree that there are no domestic suppliers, the contracting officer may ask you to proceed with submitting a proposal for a domestic non-availability waiver for this procurement.

I am suspicious that one of my competitors, who was awarded a DoD contract to manufacture a textile product, is using a non-domestic source for some of his raw-materials. Who can I notify about this?

You should notify the contracting officer responsible for this procurement. If the clause at [DFARS 252.225-7012](#) is in the solicitation/contract, the contracting Officer will investigate whether or not the contractor is complying with the contract.

I am a foreign company from a "qualifying country" who manufactures chemical warfare protective clothing. I am interested in submitting a proposal in response to a DoD solicitation that includes DFARS clause 252.225-7012 "Preference for Certain Domestic Commodities". Is my product considered compliant with the Berry Amendment?

Yes, because under [DFARS 252.225-7012\(c\)\(4\)](#) there is an exception to the Berry Amendment for chemical warfare protective clothing from countries identified as "qualifying countries" in [FFARS 225.872-1](#). However, anything to be purchased incidental to the chemical warfare protective clothing is not exempt and therefore subject to the Berry Amendment. For example, if your chemical suits or masks are provided in a canvas bag (or any other material defined as a textile), the materials for the bag must be from a US source, since there is no exception beyond the chemical warfare protective clothing itself.

DoD has negotiated Reciprocal Defense Procurement and Acquisition Policy Memorandums of Understanding with 21 countries. These countries are qualifying countries. These agreements promote rationalization, standardization, and interoperability of defense equipment with allies and friendly governments. Each country waives their respective "buy national" restrictions and customs duties, and allows the other's contractors to participate, on a competitive basis, in their defense procurements without unfair discrimination.

I am a U.S. food processor, but some of the components of my food product were grown or produced outside of the US. Is my product considered compliant with [DFARS 252.225-7012](#)?

It depends. If the food product is not fish, shellfish or seafood and is manufactured or processed in the US, it is compliant with the clause regardless of where the raw materials were grown or produced, because you are a U.S. company operating in the U.S. However, if you are processing fish, shellfish, or seafood, please see Q26 for further guidance.

I manufacture or process fish, shellfish or seafood in the United States; however some fish components of my product were caught, or delivered, from a NON-US flag vessel, operating outside of the US. Is my product compliant with [DFARS 252.225-7012](#)?

No, this does not comply with the clause. All fish, shellfish or seafood contained in food, even if it was manufactured or processed in the US, MUST come from a US-flag vessel or be obtained from fishing within the United States; AND any processing or manufacturing of the fish, shellfish or seafood must be performed on a US-flag vessel or in the United States. However, non-seafood food items that are used in the manufacture of fish products (ie. bread crumbs, spices, etc) are not subject to the restrictions that apply to seafood and can be produced outside the United States.

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